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## 'A new normative architecture' – risk and resilience as routines of un-governance

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### ABSTRACT

Our contribution describes a reorientation in the intelligibility of governance practices authorised under international law. Observing the World Bank, we narrate new managerial attitudes and organisational routines that exhibit heightened 'risk appetites'. Risk and complexity are no longer seen as limiting conditions on the institutional project, but as co-constitutive elements and constructive tools, including new sets of heuristics aimed at governing with and through contingency and unknowability. The practices that we observe are characterised by adaptive, iterative and recursive routines, flexibly attuned to immanent possibilities and aims of resilience. We situate these changes in a genealogy of governmentality, focusing on the relation to a 'surplus of life', or unruly elements of populations that persistently escape productive incorporation into the closure of institutional programmes. The World Bank's turn to resilience as a particular rationality of reform signals an institutional attempt to enrol what has escaped prior efforts at determinate institutional intervention.

**KEYWORDS** World Bank; risk; resilience; governmentality; surplus of life

### Oedipus and the wellness guru

Our contribution to this special issue takes off from questions raised in this symposium about the impossibility of closure in institutional contexts exhibiting features associated with un-governance. Closure refers in this context to the orientation of institutional practices towards 'determinate and mobile artefacts'<sup>1</sup> deployable for pre-defined governance purposes, such as benchmarks, exchangeable models and rules of general applicability. The impossibility of closure, in turn, refers to a recognition in institutional practice of

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<sup>1</sup> Deval Desai and Andrew Lang, 'Introduction: Global Un-governance' (2020) *Transnational Legal Theory* (this issue).

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'the inescapably fragile, contingent, interested, [and] indeterminate nature' of those formerly determinate and mobile artefacts, leading to the recognition of the 'ultimate practical impossibility of matching institutional structures with desired outcomes'.<sup>2</sup> The impossibility of closure reflects radical complexity in certain domains of global governance, such that institution-building will only produce 'ever-more complex effects' despite an institutional mission to 'govern or regulate complexity in the world'.<sup>3</sup> Moreover, the impossibility of closure is not merely an abstract observation, but 'emerges as a mundane and routine part of the performance of institution-building practices' – whether in moments of misrecognition and miscommunication, or an acknowledgment of limited competence, etc – manifesting the constraints of bounded knowledge.<sup>4</sup> Our interest in these phenomena, in keeping with the introduction to this special issue, is not in the reflexive awareness of these knowledge-limitations exhibited by institutional actors as they nonetheless carry out their institutional practices despite the limitations.<sup>5</sup> Rather, with the editors of this special issue, we are interested in the ways in which such limitations, hesitations or awareness of things lacking are positively mobilised for governance purposes, especially insofar as they are recently deployed in deliberate relation and even productive tension with familiar practices and notions associated with closure in a traditional institutional sense.

A close relationship between law and a defining (or constitutive) lack is not new,<sup>6</sup> but our analysis here proceeds from the possibility that the terms of that relationship have changed. Staging our analysis, we use two archetypal characters to tell a story about the World Bank, namely Oedipus and the wellness guru. This register signals the importance of narrating un-governance in material as well as psychoanalytic terms.<sup>7</sup> Oedipus, in this register, is the classic symbol for the 'agency of prohibition' behind law's traditional posture of constraint, which includes cabining and setting off limits to the unknown.<sup>8</sup> In this latter respect, the character maintains a prohibition that is both inflexible and seemingly superfluous: barring access even to the constitutive lack, which cannot be known (and so

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<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

<sup>5</sup> We are not, for example, performing Sloterdijk's critique of cynical reason. See Peter Sloterdijk, *Critique of Cynical Reason* (University of Minnesota Press, 1988).

<sup>6</sup> It can be found in work from Kelsen's *grundnorm* to Derrida's foundational violence, and points beyond and in between. Hans Kelsen, *Pure Theory of Law* (University of California Press, 1960); Jacques Derrida, 'Force of Law: "The Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992).

<sup>7</sup> We use here a Lacanian psychoanalytic vocabulary that comes by way of Žižek, drawing principally on Slavoj Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor* (Verso, 2002).

<sup>8</sup> Žižek (n 7) 266; cf, Jacques Lacan, 'A Theoretical Introduction to the Functions of Psychoanalysis in Criminology', in Jacques Lacan (ed), *Écrits* (WW Norton and Company, 2006).

cannot be accessed or overcome) in the first place. In short, the oedipal figure activates the defining lack commonly (if variously) associated with law, 'transforming the inherent impossibility of its [knowledge or] satisfaction into prohibition'.<sup>9</sup> The wellness guru, healthful and flexible popular media success, is a counterpart symbol that we propose to stand for contemporary attempts to get beyond the formal oedipal prohibition, aiming not to cabin the unknown but to access it for positive, productive purposes.<sup>10</sup> The oedipal figure attains to order with discipline. The wellness guru attains to productivity by other means, generating surplus value out of attunement to immanent conditions in the world at large, production that is unattainable by Oedipus.<sup>11</sup> The wellness guru thereby exhibits a technologically mediated adaptive immediacy, keyed to resilience that is achieved not by imposing or adhering to a fixed order, but by exploiting material conditions according to information in and of the moment. We perceive the wellness guru as symbol for a new normative architecture of un-governance, and so will flesh out the figure as we proceed. Institutionally, as our narrative of transformations at the World Bank instantiates, a turn to the wellness guru is visible in the abandonment of formal frames of legal evaluation or decision-making. The cultivation of new managerial attitudes and organisational routines display a heightened 'risk appetite' as well as a new set of heuristics aimed at coping (and governing) with and through contingency and unknowability.

Simultaneous to this shift in frames of legal reasoning, we observe a remarkable reorientation in the intelligibility of governance practices authorised under law. We examine these changes in governance practices through a Foucauldian analytic of governmentality keyed to resilience. We situate the changes we observe in the genealogy of governmentality that Foucault sketches, and focus specifically on the relation he draws between governmentality and a 'surplus of life', or the unruly elements of populations that persistently escape productive incorporation into the closure of institutional programmes.<sup>12</sup> Recognising the impossibility of closure associated with

<sup>9</sup> Žižek (n 7) 266.

<sup>10</sup> In its embrace of uncertainty as productive possibility, the image of the wellness guru intersects with other psychological prototypes in literature (particularly in relation to the entrepreneurial embrace of risk). Knight's classic text, for example, refers to the figure of the 'adventurer' – a figure traditionally associated with corporate life. Yet, with Amoores, we see an extension of this 'adventuring spirit' in current practices of (un-)governance where 'the unknowable environment is to be embraced, positively invited, for its intrinsic possibilities'. See Frank Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin Company, 1921) 311; Louise Amoores, *The Politics of Possibility* (Duke University Press, 2013) 10.

<sup>11</sup> This corresponds with Foucault's dichotomy between the sovereign (the oedipal figure) 'who can say no to any individual's desire' and the 'economic-political thought of the physiocrats' for whom the 'problem is how they can say yes to this desire' by finding ways to 'live dangerously' amid the ever emergent and unpredictable externalities of life. In Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (Palgrave Macmillan, 2008). Latour refers to this as the attunement to the 'externalities of modernity'. See Bruno Latour, 'Is Re-modernization Occurring—And If So, How to Prove It?: A Commentary on Ulrich Beck' (2003) 20(2) *Theory, Culture & Society* 35.

<sup>12</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Palgrave Macmillan, 2009).

un-governance, the World Bank's turn to resilience as a particular rationality of reform signals an institutional attempt to enrol what has escaped efforts at determinate institutional intervention. This will be manifest in the use at the World Bank of adaptive, iterative and recursive routines that are flexibly attuned to immanent possibilities in the subjects and objects of governance. In this situation, surplus and complexity are no longer seen as 'limit to the world of governmental reason but [as] the basis for governmental reason itself'.<sup>13</sup> Risk and resilience thereby emerge as co-constitutive elements in the adoption of governance tools positively mobilised around the 'impossibility of closure'.

### The World Bank as a site of un-governance

We empirically instantiate the turn to un-governance with reference to the World Bank's embrace of criminal justice reform – and security sector reform more generally – in the past decade. Two (rather simultaneous) institutional transformations defined the expansion of the World Bank's mandate and operational engagement in this domain: the replacement of traditional (read: prohibitive) practices of legal evaluation, interpretation and decision-making with performative practices of risk-management, on the one hand, and the adoption of a mode of governance oriented towards the enhancement of local resilience, on the other. In dialogue, these transformations display a deferral of foundational questions on both the legal nature of institutional authority and the causal determinants of socio-political change. They can be qualified as instances of un-governance insofar as they demonstrate a highly productive attunement to conditions of contingency and unknowability in material practices of institutional reform oriented around generally framed aspirational objectives.<sup>14</sup> Expressive of broader changes in contemporary practices of governance that operate under conditions of not-knowing,<sup>15</sup> the institutional templates of risk and resilience signal the emergence of routines, tools and techniques oriented around immanence (rather than transcendence); experimentation (rather than imposition); and open-endedness (rather than teleological determination).

Against this backdrop of developments at the World Bank, we observe a double movement arguably in keeping with the (productive) tension

<sup>13</sup> See David Chandler, *Ontopolitics in the Anthropocene: An Introduction to Mapping, Sensing and Hacking* (Routledge, 2018) 37. Chandler describes this as a shift from modernist modes of reform to the 'ontopolitics of mapping'. In a way that perfectly resonates with the World Bank's turn to resilience explored below, Chandler describes the mode of governance of 'mapping' as a form of 'systemic adaptation to emergent social, economic and environmental conditions'. This differs from the 'linear problem of optimizing scarce resources'. *Ibid*, 50

<sup>14</sup> Desai and Lang (n 1).

<sup>15</sup> Fleur Johns, 'From Planning to Prototypes: New Ways of Seeing like a State' (2019) 82(5) *Modern Law Review* 833. Johns focuses on new 'styles' of governance more attuned to inferential sensing than comprehensive knowing.

between closure and the impossibility of closure. On the one hand, the practices we describe constitute a radical departure from previous modes of liberal rule. On the other hand, we situate their performance in a longer genealogy of governmentality designed to make populations more productive for competitive purposes by making social complexity legible and available for capture in new material registers of governance.<sup>16</sup> The new tools, routines and heuristics we discuss did not emanate from fixed templates for socio-political governance and change. Instead, they overtly broke from a teleological script for institutional action. The absence of institutional ideal-types, endpoints and foundations is a constant feature in this assemblage of reformist techniques and rationalities. The getting-beyond of these structuring features promises a new or expanded field of opportunity, a making-productive of untapped conditions immanent in the (social) world at large. The unstructured, unknown or un-governed – including the Foucauldian surplus of life – does not figure here as a constraint on governance but rather as conduit and constitutive condition.<sup>17</sup> This constitutive dimension corresponds with an embrace of the impossibility of closure, as part of a move towards un-governance structures of adaptive utility and resilience.<sup>18</sup>

In the account of the World Bank, Oedipus is at work in the background as a figure holding together a traditional notion of law for practical purposes, representing a foundational but ongoing intervention to sustain the entirety of a formal structure.<sup>19</sup> According to this intervention, the mission of law is predicated on containing what remains unknown and so achieve closure. In this sense, the unknown or unknowable is constitutive of law, even as law prohibits access to it. But at a stroke, the law defines in a formal sense – it gives form to – the constitutive void that cannot be known. In this light,

<sup>16</sup> This aligns with the analysis of Duffield, who qualifies new infrastructures of data connectivity as essential for the functioning and acceleration of global security governance, which he places in a longer genealogy of liberal rule. See Mark Duffield, 'The Resilience of the Ruins: Towards a Critique of Digital Humanitarianism' (2016) 4(3) *Resilience: International Politics, Practices and Discourses* 165 ('[T]he development-security nexus has pivoted from the ground into the volumetric and vertical dimensions of a buccaneering digital atmosphere').

<sup>17</sup> We refer to the 'surplus of life' in Foucauldian terms as the multiplicity of emergent social elements that escape productive incorporation in institutional programmes. In Foucault (n 12). From the perspective of object-oriented ontology, 'this surplus is not something that ... lurks beneath the human symbolic order, as in Lacan's ... sense of "the Real," but is always a form that can never be fully translated into any set of relations'. Graham Harman, 'The Only Exit From Modern Philosophy' (2020) 3(1) *Open Philosophy* 143.

<sup>18</sup> We are inspired here by work that places the embrace of resilience in a longer lineage of governmentality. See Jessica Schmidt, 'Intuitively Neoliberal? Towards a Critical Understanding of Resilience Governance' (2015) 21(2) *European Journal of International Relations* 402; Jeremy Walker and Melinda Cooper, 'Genealogies of Resilience: From Systems Ecology to the Political Economy of Crisis Adaptation' (2011) 42(2) *Security Dialogue* 143; David Chandler, 'Beyond Neoliberalism: Resilience, the New Art of Governing Complexity' (2014) 2(1) *Resilience: International Politics, Practices and Discourses* 47, 47 (arguing that, in contrast to 'actually existing neoliberalism', 'resilience asserts a flatter ontology of interactive emergence').

<sup>19</sup> In Lacanian terms, we describe Oedipus as *point de capiton*. See Žižek (n 7) 16–27; Slavoj Žižek, *The Sublime Object of Ideology* (Verso, 1989) 109ff.

the law is an intervention, violent and lawless in the first instance like any other intervention, but the one ongoing intervention that achieves the prohibition of any further intervention.<sup>20</sup> Oedipus's law turns what is not or cannot be known into what *must not be known*. Further, there is an important temporal aspect to such an intervention: it is always retrospective, communicating from the first instance an order that always already exists.<sup>21</sup> Our argument here is that un-governance likewise is intelligible as part of an order that already exists, a temporal order organised according to escalating competition and ever more productivity without object or end (the *dispositif*). The figure of the wellness guru holds together the new formal institutional mandate appropriate for practical purposes to this condition. In contrast to Oedipus's intervention, however, the wellness guru turns what is not or cannot be known into what *must be exploited*. In this way, the wellness guru attains to closure by embracing its impossibility.

Thus, the move to un-governance within an institutional context still committed to closure, such as the World Bank, involves a radical move to incorporate the surplus of life that has historically escaped successive modes of governance. In this sense, the mobilisation to exploit even the surplus of life is constitutive of the move to un-governance, a continuation of a genealogy of governmentality but also a break from prior modes. The continuation and the break both consist of the embrace of the elusive, contingent possibilities encompassed within the multifariousness of a population. The confrontation, then, between the constant escape of the surplus of life and the development of the technologies and tools of modern governance designed to contain it is one factor to explain governmentality keyed to the contingent and emergent in this register of un-governance. These fundamental tensions track and elaborate on the tensions sketched in the introduction to this special issue. They also arguably call for a shift from representational to performative modes of critique that do not take the technology of risk as a (potentially flawed) map of reality, but focuses on its 'productive work' in constituting new objects of knowledge, templates of institutional practice, managerial subjectivities and rationalities of reform.<sup>22</sup> We will instantiate immediately below the development and deployment of destabilising techniques at the World Bank that do not

<sup>20</sup> Cf. Žižek (n 7) 31–34.

<sup>21</sup> *Ibid*, 16–20

<sup>22</sup> This shift from representational to performative modes of analysis is inspired by Andrew Lang, 'International Lawyers and the Study of Expertise: Representationalism and Performativity' in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar Publishing 2018). Inspired by Johns' observation on the shift from 'planning to prototypes', Lang calls for a mode of critique going beyond 'denaturalization, rehistoricization, decoding' and employs the perspective of performativity to ask a different range of questions: 'what productive work do [knowledge practices] do as they circulate? What forms of social action are they able to mobilize and how? What subjects, objects, and situations are produced in the manner of their circulation and deployment, and how?' For Lang, expertise is 'less about producing objective common sense, and more about the



pretend to observe fixed models or maps of reality – models or maps that critique might once have shown up for their shortcomings – but are performatively linked to immanent possibility associated with an elusive surplus of life. The object of our analysis as part of this special issue is to contribute to a new stream of critique trained on the productive power apparent in this new mode of governance.

### **A 'new normative framework' – introducing the organisational routine of risk management**

The first empirical thread of the article is focused on the way that the World Bank's turn to criminal justice and security reform was legally justified and rationalised. The analysis is centred around the displacement of prohibitory legal considerations through the development of a 'new normative architecture' (described as a 'paradigm shift' by former General Counsel Leroy).<sup>23</sup> In this context, we retrace salient changes in the practice of lawyering and the processes of internal legal evaluation in the World Bank, where the deformed technology of risk-management replaced traditional legal hermeneutics, conceived as constraints or prohibitions. These changes align with the frame of our analysis insofar as they are centred around the shift from 'rules to principles' and from 'risk avoidance to risk management' as the new paradigm for legal interpretation.<sup>24</sup> This 'new normative architecture' also aimed to cultivate a particular prototype of the institutional lawyer: a pragmatic, managerial type who has traded the binary and prohibitive logic of (il)legality for a calculative and adaptive multiplicity of novel techniques to manage contingency and unknowability.

Criminal justice reform and engagement with the security sector of states had traditionally been seen as legally off-limits for the Bank. In 1997, Sureda – who was one of the leading figures in the legal department during the era of Shihata (General Counsel from 1983 to 1998) – had drafted an opinion which expressed that 'police power is an expression of the sovereign, political power of a state over all persons and things' and that, for this reason, 'financing of police expenditures, as a class, would not be consistent with a reasonable reading of the Bank's Articles'.<sup>25</sup> 'Appraisal of police activities', the opinion continued, 'would necessarily require the World Bank to take into account political and other non-economic consideration and would

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practical work of organizing action despite skepticism ... as well as the bracketing of epistemological differences' (at 149).

<sup>23</sup> See World Bank LVP, *Annual Report FY 2013: The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the 'Solutions Bank'* (World Bank, 2013) (referred to below as 'LVP Annual Report 2013').

<sup>24</sup> *Ibid*

<sup>25</sup> Andres Rigo Sureda, 'Eligibility of Police Expenditures for Bank Financing' (1997) (Copy on file with author).

not be consistent with the prohibition of political activity'.<sup>26</sup> '[T]he Bank', Sureda stipulated, 'is not an organization to serve all purposes but only those specifically included in the Articles' and should refrain from engaging in this operational domain.<sup>27</sup> This categorical prohibition resonates with the figure of Oedipus – law appears in its rigid, binary form: a formal delineation of what could reasonably be brought under the reformist ambit of the World Bank. Simultaneously, this legal intervention – described by Leroy as epitomising the 'old', 'traditional' and 'risk-averse' mode of lawyering – equally entailed an expression of the World Bank's political authority (and its juridical boundaries) as derived from a foundational, formal legal act of sovereign delegation.<sup>28</sup>

This 'traditional' and prohibitive approach, Leroy lamented, had been 'interpreted as a complete bar to engagement in the criminal justice sector'.<sup>29</sup> As a clear expression of the entrepreneurial logic that underpinned the core of her legal intervention, she argued that this orthodox practice of 'drawing a "bright line" between the permissible and the impermissible' had created an excessive 'opportunity cost' for the World Bank.<sup>30</sup> Leroy, a graduate from the French *Ecole Normale d'Administration* (ENA) who perceived her role as 'allowing this institution to adapt',<sup>31</sup> perceived an urgent need to dismantle these prohibitory, outdated evaluations in her 2012 legal memorandum on criminal justice reform.<sup>32</sup> '[O]ne traditional view in the Bank has it that criminal justice is ... essentially an exercise of sovereign power', the opinion observes, claiming instead that 'our understanding of the criminal justice sector has evolved decisively ... The sector is now seen as provider of public services'.<sup>33</sup> Considering that the criminal justice sector is seen as merely a 'provider of public services' (rather than the expression of state sovereignty), the opinion provides that 'a blanket prohibition on Bank involvement in the sector on political interference grounds would be overly broad'.<sup>34</sup> Subsequently, and even more significantly, the opinion expresses that the logic of legality 'need not be binary' and that 'political interference' is not a label assigned to particular domains of state reform but a 'risk that could be managed'.<sup>35</sup>

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<sup>26</sup> *Ibid*

<sup>27</sup> *Ibid*

<sup>28</sup> On the tenets, cultivation and institutional effects of 'traditional' approach, see Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's turn to Governance Reform' (2019) 32(1) *Leiden Journal of International Law* 47.

<sup>29</sup> LVP Annual Report 2013 (n 23) 93.

<sup>30</sup> *Ibid*, 93, 94.

<sup>31</sup> Interview with Anne-Marie Leroy (Washington DC, October 2016).

<sup>32</sup> Anne-Marie Leroy, Legal Note on Bank Involvement in the Criminal Justice Sector (9 February 2012) (copy on file with author) (referred to below as 'Leroy Criminal Justice Opinion').

<sup>33</sup> *Ibid*, para 22

<sup>34</sup> *Ibid*, para 26

<sup>35</sup> *Ibid*, para 34

In Leroy's turn away from a 'binary', prohibitive logic to adaptive 'management strategies', we witness the core of what the memorandum describes as a decisive 'paradigm shift' in legal practice.<sup>36</sup> This shift in practice was promoted both materially (through the introduction of new templates of assessment and evaluation) and subjectively (through the cultivation of new professional attitudes). In justifying the organisation's embrace of security sector reform, Leroy thereby enacted a categorical rejection of the mode of law through which Shihata had perceived and constructed his institutional authority: a legal practice consistently aiming at delineating clear 'boundaries' between the legal and illegal, the 'permissible and impermissible'.<sup>37</sup> The structuring device of the 'old' legal framework was a dichotomy between political sovereignty and international institutional authority, which aligned with the image of the World Bank as intergovernmental entity operating under international law and always at risk of acting *ultra vires*. By intervening – in the nature of the wellness guru's intervention, which supplants the oedipal attitude – to qualify states as both clients (of the World Bank) and providers of services (towards its citizens), the old structuring device was disabled and replaced by a managerial technology of risk aimed at both the management of and productive engagement with contingency.<sup>38</sup>

This new ideal of lawyering aligned with President Jim Yong Kim's call to increase the 'risk appetite' and sharpen the entrepreneurial spirit of the Bank's senior management.<sup>39</sup> As Leroy argued, this did not entail the introduction or rejection of particular legal norms or doctrines, but, rather, implied both a professional reorientation and recourse to a novel set of evaluative tools: the need to '*instill and nurture a culture of informed risk-taking*' and to '*build an institutional architecture for informed risk management*'.<sup>40</sup> '[L]awyers will have a crucial role to play', Leroy elaborates, 'but a different one than before, requiring a different approach to legal issues' supported by 'a new concept of our normative architecture'.<sup>41</sup> This significant professional transformation – which Leroy described as a general shift from 'rules to principles' and from 'risk avoidance to risk management' – was grounded in a specific perspective on the nature and purpose of legal authority and manifested in a new set of tools, managerial heuristics and bureaucratic techniques for the assessment and management of 'risk'.<sup>42</sup>

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<sup>36</sup> LVP Annual Report 2013 (n 23) 94.

<sup>37</sup> *Ibid*

<sup>38</sup> On the emergence of a 'governmental technology of risk' in the public sector more generally. See Julia Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' (2005) *Public Law* 512; Jonathan Pugh, 'Resilience, Complexity and Post-Liberalism' (2014) 43(3) *Area* 313.

<sup>39</sup> Jim Yong Kim's 'Change Agenda' called for a 'major shift in paradigm ... from a rules-based to a principles-based normative approach to operations that encourages informed risk-taking'. LVP Annual Report 2013 (n 23) 90.

<sup>40</sup> *Ibid* (emphases added).

<sup>41</sup> *Ibid*

Before elaborating on these specific tools and techniques, it is important to note that the embrace of risk called for by the World Bank's president was manifested far beyond the domain of criminal justice reform and the specific institutional segment of the legal department. Leroy's 2013 essay stresses the nexus between changes in the 'culture' of lawyering and the observation that 'the Bank is undergoing certain fundamental changes in its way of doing business'.<sup>43</sup> Signifying these changes was the creation of a new lending instrument – Program-for-Results financing (PforR) – that was introduced by the Bank in January 2012.<sup>44</sup> This instrument ties the Bank's funding to the 'achievement of verifiable results and performance actions' and operates on the basis of 'country and program-specific strategic, technical and risk considerations'.<sup>45</sup> The programmatic aspects of this vehicle rely on a diagnostic apparatus to quantify, assess and compare 'the existing economic, technical and political situation in the member's territory' as well as 'the strength of [their] existing institutions'.<sup>46</sup> On the basis of these evaluations, a determination is made on the 'parameters of the program' and an operational strategy is developed to 'strengthen or build' national institutions in order to 'minimize risk'.<sup>47</sup> Additionally, in response to recommendations by the Bank's Internal Audit Department (IAD) and Independent Evaluation Group (IEG),<sup>48</sup> the organisation's senior management developed a range of reforms proposals regarding the Bank's main lending instrument – Investment Project financing – which culminated, following Board approval, in a new integrated operational policy (OP 10.00).<sup>49</sup> At the heart of this 'modernization' was the endorsement of a 'risk-based approach for investment lending' and a shift from a 'rule-based' operational process to a culture of 'informed risk-taking'.<sup>50</sup> Not only did the Bank need to measure and

<sup>42</sup> Particularly telling was Leroy's managerial manifesto on the proper role of the lawyer in the 'solutions Bank'.

<sup>43</sup> LVP Annual Report 2013 (n 23).

<sup>44</sup> This involved the adoption of Operational Policy and Bank Procedure (OP/BP) 9.00. Previously, the Bank had two key lending instruments: Investment Project Financing (regulated in OP/BP 10.00) and Development Policy Financing, which has replaced and reproduced the structural adjustment lending (SAL) (regulated in OP/BP 8.60).

<sup>45</sup> See OP 9.00 (n 44) para 5.

<sup>46</sup> LVP Annual Report 2013 (n 23) 91. This diagnostic is embedded in the Bank's 'systematic country diagnostics' (SCD) that underpin its comprehensive 'country partnership frameworks' (CPF). For a more elaborate definition of this new lending instrument: 'PforR relies on Bank assessments of programme systems and institutions, promotes an integrated approach to risk, and encourages management rather than avoidance of risk, by identifying risks, and balancing them against results. PforR relies on the borrowers' fiduciary, environmental and social systems, and seeks to address gaps in such systems through a combination of initiatives, from legal requirements and actions, to capacity building, disbursement incentives and to implementation support'. In *ibid* 13 (emphasis added).

<sup>47</sup> In OP 9.00 (n 44) para 5–8. On the rationality of reform in the PforR framework. See Maninder Malli, 'Assessing Capacity Development in World Bank "Program-for-Results Financing"' (2014) 47(2) *Verfassung und Recht in Übersee* 250.

<sup>48</sup> See, *inter alia*, Internal Audit Department (IAD), Audit of the World Bank Group Framework for Policies and Procedures, AC2012-0011 (February 2012) (copy on file).

<sup>49</sup> See World Bank, *Investment Lending Reform: Concept Note* (2009) (copy on file); OP/BP 10.00 (n 44).

manage ‘risk’ with more conviction and awareness, the organisation also needed to ‘help [its] client countries to strengthen their own risk management systems’.<sup>51</sup>

The shift from a ‘rules-based’ paradigm (where concerns regarding mandate, political interference or legal competence pivot centrally) to the ‘principles-based’ operational template of analytical country diagnostics and risk-management techniques, aligns with the emergence of a ‘risk commonwealth’<sup>52</sup> in public governance more broadly. For Leroy, who had built out a career in public sector reform this register came naturally: risk management, not international law, had been her bread and butter.<sup>53</sup> This managerial reform did not only have an impact on the design of the Bank’s lending instruments and procedures (as explored above), but also impacted both the processes of enacting and legitimising the organisation’s internal accountability standards that were altered (or dissolved). As an example of the latter aspect, Leroy’s essay refers to the organisation’s new ‘Environmental and Social Framework’.<sup>54</sup> ‘A key feature of the new framework’, she observes, ‘will be a risk assessment approach ... a measured shift towards the mitigation and management of risks’.<sup>55</sup> Indeed, the key change in the environmental and social safeguards lies not in the minor substantive extensions to previously disregarded policy domains or in the ambiguous references to international (human rights) law but in the shift from *ex ante* deontic standards to a process of downstream contextual assessment and continuous managerial modification. The prescriptive *ex ante* evaluation of projects based on formal normative criteria is thereby traded for a process of ‘adaptive [risk] management’ based on ‘downstream monitoring and implementation support’.<sup>56</sup> Reflecting on these changes in the Bank’s lending instruments and in the changing contours of its accountability standards, Leroy concluded that ‘[t]he *leitmotiv* of all these initiatives undergirding the construction of a ‘Solutions Bank’ is clear’:<sup>57</sup> the Bank, she asserted, had taken a decisive turn toward ‘more agile [and] less regulated decision-

<sup>50</sup> See OPCS, *Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures*, (World Bank 2012) (copy on file) (clarifying that ‘[m]anagement outlined an investment lending reform programme that was based on ... implementing a risk-based approach for investment lending’).

<sup>51</sup> LVP Annual Report 2013 (n 23) 91.

<sup>52</sup> Elizabeth Fisher, ‘The Rise of the Risk Commonwealth and the Challenge for Administrative Law’ (2003) 3 *Public Law* 455.

<sup>53</sup> This was, of course, not only the professional trajectory of Leroy but also of the people she gathered around her. Anna Chytla—who was Deputy General Counsel under Leroy—left the Bank’s Legal Vice Presidency shortly after Leroy did in 2016 to join LF McCarthy Associates, ‘an international integrity and risk management services company’. Her webpage highlights extensive experience in ‘managing risk’ and enhancing ‘agility’, as obtained and developed in the legal department of the Bank. <https://www.lfmcCarthyassoc.com/copy-of-scott-b-white> (accessed 9 September 2020).

<sup>54</sup> World Bank, *Environmental and Social Framework* (2016) (referred to as ‘ESF’).

<sup>55</sup> LVP Annual Report 2013 (n 23) 92.

<sup>56</sup> ESF, ESS1 (n 54) para 39, 44.

<sup>57</sup> LVP Annual Report 2013 (n 23) 92

making based on informed risk-taking'.<sup>58</sup> These broad-sweeping managerial changes clearly called for a particular mode of lawyering associated with a new institutional toolkit of risk management.

### **'Taking on the technicalities'<sup>59</sup> – the institutional toolkit of un-governance**

In a section of the legal opinion titled *Managing Risks of Political Interference*, Leroy introduces new risk templates and typologies,<sup>60</sup> tools of probability calculus and cost-benefit analysis, and a 'special review' mechanism aimed at iterative risk 'monitoring'.<sup>61</sup> The prohibitive posture of lawyering is to be traded, the opinion elaborates, for a 'series of measures aimed at analysing the risks [of political interference] and managing them'.<sup>62</sup> This new 'analytical framework' – as Leroy describes it – discards the 'binary logic' of the 'traditional' legal posture (never constituting a formal act of judgment), and operates on the basis of a 'spectrum' of 'risk categories',<sup>63</sup> each associated with 'mitigation measures as well as capacity-building activities to address those risks'.<sup>64</sup> The reference to such 'capacity-building activities' in this central 'tool' of the new 'risk-based approach' signals how the embrace of this new logic not only impacts the institution's internal decision-making processes (including processes of legal interpretation and legal evaluation) but also its envisaged mode of institutional reform, which now increasingly focuses on enhancing the local capacities for risk resilience. Both the identification and qualification of 'risks' and the enactment of productive coping strategies and capacity building projects forms part of a flexible and adaptive learning process that we identify with the wellness guru.

Since many lawyers in the World Bank were unfamiliar with this methodology (or considered it to be 'unlawyerly'),<sup>65</sup> Leroy distributed a Staff Guidance Note. Its purpose was announced as follows:

[t]his note does not set out a prescriptive set of instructions but provides guidance for Bank staff on how to analyse whether an [involvement in the criminal justice sector] is appropriate for the Bank to engage in, how to

<sup>58</sup> *Ibid*

<sup>59</sup> Cf Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 (3) *Buffalo Law Review* 973.

<sup>60</sup> Leroy Criminal Justice Opinion (n 32) para 34.

<sup>61</sup> *Ibid*, paras 31–34

<sup>62</sup> *Ibid*, para 27

<sup>63</sup> *Ibid*, para 34. The opinion differentiates between 'red', 'green' and 'grey areas'. Different colours are linked with different management techniques to be employed and adapted iteratively.

<sup>64</sup> *Ibid*, para 1

<sup>65</sup> Interview with Senior Legal Official, World Bank Legal Vice Presidency, (Washington DC September 2016).

assess the risks involved, and how to develop a risk-taking and management strategy.<sup>66</sup>

The note clarifies that ‘risks and related management approaches will vary from country to country and project to project’ and be part of an ‘iterative process’ of learning and adaptation.<sup>67</sup> Three broad stages and associated institutional procedures are identified: (i) assessment and categorisation; (ii) management and mitigation; and (iii) monitoring and special review.<sup>68</sup> In developing the different stages of the new ‘analytical framework’, the Staff Guidance Note links the required change in legal practice with pre-existing operational templates: ‘the risk management framework’, Leroy’s opinion clarifies, ‘builds on the Bank’s Operational and Risk Assessment Framework (ORAF) and other risk assessment and management approaches and tools applied in Bank operations’.<sup>69</sup> As a managerial ‘tool’ for the risk-based approach, the ORAF is employed to help lawyers to ‘rate risks’ along a ‘linear rating scale’ and develop the appropriate ‘management and mitigation’ techniques.<sup>70</sup> It provides an ‘integrated and nested risk framework that pulls together key risk areas that may affect the achievement ... of an IL [Investment Lending] operation’.<sup>71</sup> The objective of this ‘tool’, it is noted, is to ‘help managers’ to ‘look systematically, holistically, in an integrated manner and in real time, at risks to achieving project development objectives (PDOs)’.<sup>72</sup> In a methodology that was replicated in the Staff Guidance Note, ORAF provides a ‘framework’ to ‘(i) identify and describe relevant risks ... (ii) rate those risks [and] (iii) establish adequate risk management measures’.<sup>73</sup>

The stated purpose of ORAF explicitly disavows normativity: it is ‘there to help’ teams in calculating and containing contingencies that can hamper the achievement of their PDOs.<sup>74</sup> The ruling rationality of the risk-based

<sup>66</sup> Legal Vice Presidency, Staff Guidance Note: World Bank Support for Criminal Justice Activities (February 2012) (copy on file with author) (referred to below as ‘Staff Guidance Note’) i.

<sup>67</sup> *Ibid*

<sup>68</sup> *Ibid*, ii–iii

<sup>69</sup> Leroy Criminal Justice Opinion (n 32) para 4.

<sup>70</sup> *Ibid*, para 34; Cf OPCS, *Guidance Note on the Operational Risk Assessment Framework (ORAF)* (World Bank 2011) (referred to below as ‘ORAF’) paras 2, 4.

<sup>71</sup> ORAF (n 70) para 7.

<sup>72</sup> *Ibid*, para 5. The risk assessment framework consists of ORAF Guiding Questions: ‘a reference document to facilitate the team’s discussions as they identify and describe risks relevant to their operation and to ensure a comprehensive risk overview’. It also contains a ‘risk assessment template ... available as a web form at all stages of the project cycle’. See *ibid* paras 14, 29 (emphases added).

<sup>73</sup> *Ibid*, para 7. The ‘four different levels of risk’ are identified as ‘stakeholder risks’ (where ‘teams need to be aware and mitigate’); ‘operating environment level risks’ (where teams ‘should be aware ... even though they cannot generally be mitigated’); ‘implementing agency level risk’ including ‘capacity risk’ and ‘governance risk’ (where ‘there is scope to influence the risk level ... through mitigation measures’) and ‘project level risk’ (‘where there is the most scope for mitigating and controlling risk levels through project design’). In *ibid* para 8.

<sup>74</sup> *Ibid*, paras 5 (‘using risk assessment ... helps teams ... identify and address emerging issues, including unanticipated risks’); 14 (‘[t]he document should be used to stimulate thinking, discussion, or even provoke deeper analysis of less known risk dimensions ... The risk dimensions [and] risk categories ... are there to help’) (both emphases added).



operational toolkit is entrepreneurial: the guiding concern is the ‘achievement of the project’s results’, and ‘risk ratings’ are attributed on the basis of the ‘impact of the risk’ on these results and the ‘probability that the risk will occur’.<sup>75</sup> The routine of risk management thereby provides modes of calculation and adaptation oriented towards value-enhancing, competitive behaviour – the ‘risk appetite’ demanded by senior management – and the promotion of economic rationality. Foucault’s epithet, ‘live dangerously’, applies here as the motto of a managerial toolkit occupied less with ‘threat and loss’ than with ‘gain and profit’.<sup>76</sup> This logic resonates also in Leroy’s defence of her ‘paradigm shift’: while engagement with the criminal justice sector ‘pos[es] considerable risks’, she argues, it ‘also promise[s] transformational rewards’.<sup>77</sup> The productive logic embedded in this shift from ‘rules’ to ‘principles’ is further elucidated in Leroy’s introduction of a probability-based cost–benefit calculus aimed at ‘weighing the residual risks against anticipated benefits’,<sup>78</sup> as well as the integration of the ‘risk of absence’: it would make ‘strategic sense’, Leroy’s Staff Guidance Note states, if the World Bank would also weigh the ‘risk of not acting’, the risk of missing out, against ‘risks [of] political interference’ involved in ‘undertaking action in the criminal justice system’.<sup>79</sup>

To facilitate the risk-based approach, which provides the model for Leroy’s ‘paradigm shift’ in legal practice, ORAF provides a ‘risk assessment template’;<sup>80</sup> an online ‘risk portal’ for virtual adaptation at the project

<sup>75</sup> *Ibid*, paras 3, 16. On the ‘entrepreneurial logic’ of ‘new public risk management (‘NPRM’) more generally. See also Black (n 38) 513 ([t]he development of internal risk management systems ... is in essence the transposition of private sector risk management methods ... to central government’).

<sup>76</sup> Cf Foucault (n 11) 66 ([W]e can say that the motto of liberalism is: ‘Live dangerously’. [I]ndividuals are constantly exposed to danger, or rather, they are conditioned to experience their life, their present, and their future as containing danger. I think this kind of stimulus of danger will be one of the major implications of liberalism’). As elaborated in the concluding sections, this urge to ‘live dangerously’ is intimately intertwined with Foucault’s account of governmentality and the displacement of sovereign authority by governmental forms attuned to emergent opportunities and desires. See also (n 11). Kim’s ‘change agenda’ oriented around the need to increase ‘risk appetite’ gives these observations a prophetic ring.

<sup>77</sup> LVP Annual Report 2013 (n 23) 95. She recurrently refers to the ‘opportunity costs’ implicated in the ‘traditional approach’. This register of transformational rewards shows a remarkable overlap with the contemporary risk management techniques that resonate across the domains of corporate consultancy and security governance. It echoes, for example, in the declaration by Anderson Consulting (now Accenture) that ‘in today’s economy you have to *embrace risk in order to thrive*’ and that ‘*there is no reward without risk*’. ‘Safe’ strategies of oriented at avoiding risk therefore needed to be traded for strategies capable of capitalising on uncertainty—much in the same way as the promise of ‘transformational rewards’ made by Leroy. This productive attunement to risk in the ‘new normative framework’ of the World Bank testifies to the observation by Amore that ‘the business ... models for embracing risk and thriving on uncertainty [have] become a resource to a sovereignty that similarly seeks securability in place of security’. See Anderson Consulting, *Embrace Risk: Managing Risk to Create Value* (2002), cited in Amore (n 10) 73.

<sup>78</sup> *Ibid*, 98

<sup>79</sup> Staff Guidance Note (n 66) para 19.

<sup>80</sup> This template provides empty text fields where specific project risks need to be indicated, rated and ranked, alongside risk management initiatives that specify the responsible actors and results. See ORAF (n 70), attachment.



# Risk-Based Approach: Application at Project Level

## 1. Understand it

- Operational Risk Assessment Framework (ORAF):
- It stresses thinking about risks to the Project Development Objective(s)
- Nested model with 4 levels in which teams examine 10 risk categories and have an optional risk category to use if needed



## 4. Time it

- Teams also need to decide if mitigation of risks is best during preparation or implementation; this is important to focus efforts on where they are most needed

## 5. Track it

- Taking the risk rating and timing for mitigation into account, decide on the project's overall risk rating at preparation and implementation and the project processing track:
  - Track 1 (Express Lane)
  - Track 2 (Standard)

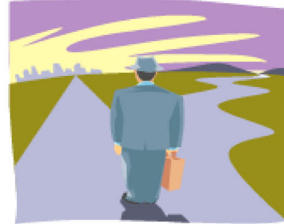


## 2. Assess it

- To provide a risk rating for each category, we use a two dimensional scale looking at likelihood and impact of risks
- Teams are also given standard definitions and a set of guiding questions to assist thinking about the types of issues in each category

## 3. Mitigate it

- Look at the risks and think about the ones you need to be aware of and the ones that can be mitigate through the project
- Be realistic and propose no more than 4 mitigation measures per category



Do not forget it during implementation!

**Figure 1.** A visual heuristic for the risk-based approach (ORAF).<sup>1167</sup> 167 ORAF (n 70) 20.

level; visual heuristics for management training (*cf* Figure 1); ‘rule[s] of thumb’ for risk management measures;<sup>81</sup> a ‘roadmap’ for risk evaluation;<sup>82</sup> ‘guiding questions’ for risk assessment;<sup>83</sup> and detailed allocations of roles and responsibilities in the ‘dynamic process’ of risk management.<sup>84</sup> In inter-linking legal decision-making with this managerial framework of risk assessment, Leroy’s ‘new normative architecture’ now reconfigures and reduces the role of the lawyer to her ‘participation ... in the [project] team discussions [on] the PCN [Project Concept Note] risk ratings’.<sup>85</sup> This shift in the role of the lawyer is also explicit in the ‘special review process’ that was introduced by Leroy’s legal opinion and guidance note.<sup>86</sup> To ensure that ‘all relevant risks are carefully analysed and appropriate ... risk management measures [are] identified’,<sup>87</sup> Leroy noted that the creation of a new ‘mechanism to provide task teams with expert guidance in this new and risky area ... appear[ed] warranted’.<sup>88</sup> To this end, the self-proclaimed ‘paradigm shift’ in legal practice enacted by Leroy was accompanied by the creation of a new institutional mechanism: the Criminal Justice Resource Group (CJRG). This CJRG, Leroy set out, would need to be involved in the planning of all ‘high risk’ projects, where it would provide ‘expert analysis of risk and the identification of potential safeguards and risk management measures’.<sup>89</sup> The guidance note (as well as the legal opinion) stipulates that the key normative concern of the CJRG is not the legality of proposed projects, but the operational and ‘reputational’ risks for the World Bank.<sup>90</sup> The composition of the CJRG equally signals a relative displacement of legal authority as it is

expanded to include experts from across the Bank in areas such as justice reform, crime and violence prevention, environmental crimes, risk management, urban planning, youth development, gender, stolen asset recovery, anti-money laundering, and assistance to fragile and conflict-affected states,

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<sup>81</sup> ORAF (n 70) para 21.

<sup>82</sup> *Ibid*, para 29

<sup>83</sup> *Ibid*, para 14

<sup>84</sup> *Ibid*, para 39. The project team emerges as entity responsible for the articulation and constant assessment of operational risks (aided by country, sector and financial management).

<sup>85</sup> *Ibid*, para 39

<sup>86</sup> Staff Guidance Note (n 66) para 43.

<sup>87</sup> *Ibid*

<sup>88</sup> *Ibid*. The CJRG is given a wide mandate: ‘participation in the CAS/CPS [Country Assistance Strategy/ Country Partnership Strategy] process’; ‘participation in the development of PCNs [Project Concept Notes] and Projects Appraisal Documents (PADs)’; ‘Technical Assistance (TA)’; and ‘documenting and evaluating progress [by] develop[ing] a data base of lessons learned that will inform programming in the criminal justice sector over time’. *Ibid*, para 45

<sup>89</sup> *Ibid*, para 46 (‘[I]n the exceptional cases wherein the Bank decides to undertake activities that are high risk, teams must seek the advice of the CJRG to review the proposed activities in order to provide teams and Bank decision makers with expert analysis of risks and the identification of potential safeguards and risk management measures. [T]his review [should] take place prior to the finalization of the PCN [Project Concept Note], so that guidance from the CJRG can be taken into account by the team to develop risk management measures early on in project preparation’).

<sup>90</sup> *Ibid*, para 43

as well as the relevant Regional staff and OPCS [Operations Policy and Country Services].<sup>91</sup>

The emergence of risk-management as a productive encounter with uncertainty is less the product of consciously planned attempts to overcome or accommodate the impossibility of closure, than it is an effort to capitalise on it by means of institutional arrangements of unsettlement and reconfiguration determined by adaptive managerial diagnostics and institutional templates. ORAF explains that

[r]isk assessment is a dynamic process starting with preparation and continuing through implementation. This assessment will help to continuously monitor the evolution of risks; to identify the emergence of new risks; to assess progress with, and impact of the implementation of risk management measures; and, as necessary, to devise appropriate adjustments to support to achievement of the project's results.<sup>92</sup>

The 'live document' of ORAF, which serves as a key instrument of this unsettlement and production, is intertwined with myriad techniques for sensing or gauging material conditions on the ground. In its (wellness guru) mode of channelling the impossibility of closure,<sup>93</sup> Leroy's 'new normative architecture' of risk-management thereby works in conjunction with an extensive informational infrastructure.<sup>94</sup> As the Staff Guidance Note indicates, the registration, management and mitigation of risk – or, in positive terms, its production and circulation – demands an 'in-depth understanding of the agencies and other stakeholders involved and targeted'.<sup>95</sup> Risk is constituted through an extensive set of 'diagnostic tools' and 'analytic and advisory activities (AAA)' that provide a 'holistic analysis of the country's institutions and legal system'.<sup>96</sup> It is in this context that we have to situate the calls for a technical alignment of 'standard operating procedures' in security systems and the adoption of 'shared data standards' for the 'effective performance measurement and monitoring of [security] sector agencies'.<sup>97</sup> In its reliance on, and its emergence from, constant informational flows – data that is rendered actionable through its enrolment in premade templates – the governmental technology of risk demands specific practices of observation that are

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<sup>91</sup> *Ibid*, para 44

<sup>92</sup> *Ibid*, para 3

<sup>93</sup> Desai and Lang (n 1).

<sup>94</sup> This demands attention to the material assemblages and alignments shaping institutional practices. See *ibid*.

<sup>95</sup> Staff Guidance Note (n 66) para 23, section 4.

<sup>96</sup> *Ibid*, para 22. These analyses stand in dialogue with the World Bank's Systemic Country Diagnostics (SCDs). On the performativity of SCDs as governmental tools, see Dimitri Van Den Meerssche, 'International Organizations and the Performativity of Measuring States' (2018) 15(1) *International Organizations Law Review* 168.

<sup>97</sup> *Ibid*, para 23, section 10

increasingly facilitated by practices of data analytics.<sup>98</sup> This does not imply that the technology of risk management labours towards the closing of knowledge gaps – rather, it signals the grounding of these organisational routines in computational practices that produce ever more objects of knowledge and subjects of reform.

### **'The role of the lawyer in the solutions bank'<sup>99</sup> – risk as productive professional practice**

The qualification of this institutional technique as a provisional, material assemblage enacted through mundane professional practices helps to appreciate the performative and productive nature of the risk-based governance tools. The 'risk scores' that serve as focal points in Leroy's 'new normative architecture' do not (purport to) serve as unmediated representation of external phenomena to be acted upon, but serve as thoroughly artificial heuristics allowing the organisation to move beyond the impossibility of closure in a productive manner. It is through these iterative and adaptive practices of assessment, mitigation and management itself that risk artefacts gradually coagulate and form effects in stable networks of institutional practice.<sup>100</sup> 'Risk', Dillon generally observes, 'is a carefully crafted artefact [and] does not exist "out there", independent ... of the computational and discursive practices that constitute specific risks as the risks that they are ... Risks are thus created, circulated, proliferated and capitalized upon'.<sup>101</sup> The direct relationship between 'risk assessment' and 'capacity-building activities' in the ORAF further signals how the embrace of this new technology not only impacts the 'paradigm', 'analytical framework' or 'normative architecture' of legal evaluation in the World Bank, but also its envisaged mode of governance reform (focused now on enhancing immanent capacities of risk resilience).<sup>102</sup> For projects in contentious operational domains (such as the security sector), the ORAF provides novel bureaucratic tools for designing 'capacity-building activities' in the client state; evaluating 'whether or not to go forward' with the operation and 'deciding on the processing speed' of the project in the World Bank's transactional machinery.

<sup>98</sup> One of the first projects employing Leroy's 'new normative architecture' indeed focuses on building and maintaining an infrastructure for 'high-quality' 'geo-referenced crime and violence data' by financing national and municipal 'violence observatories'. See World Bank (IDA), *Honduras – Safer Municipalities Project*, Project Appraisal Document (15 November 2012) (referred to below as 'Honduras Safer Municipalities Project') 3.

<sup>99</sup> See LVP Annual Report 2013 (n 23).

<sup>100</sup> Cf Foucault (n 12) 248; Gavin Sullivan, 'Taking on the Technicalities of International Law—Practice, Description, Critique: A Response to Fleur Johns' (2017) 111 *AJIL Unbound* 181.

<sup>101</sup> Michael Dillon, 'Underwriting Security' (2008) 39 *Security Dialogue* 322.

<sup>102</sup> Cf David Chandler, 'Rethinking the Conflict-Poverty Nexus: from Securitizing Intervention to Resilience' (2015) 4(1) *Stability: International Journal of Security and Development* 2. In the next section we focus in more detail on the rise of 'resilience'-based thinking in the World Bank's reformist practices.

'Some measures', the ORAF indicates, 'may go beyond mitigation to also include capacity building and system enhancements to reduce the risks *not only for the duration of the operation but also to prepare the borrower for better dealing with such risks following the conclusion of the operation*'.<sup>103</sup> Yet, the ORAF explicitly denies that its risk-based diagnosis and 'capacity-building' would thereby constitute an evaluative, political enterprise: '[c]lients ... should understand that the Bank uses risk ratings to make decisions as to best support [them] and is not making value judgments or ranking countries'.<sup>104</sup> The governmental logic of risk unfolds in an agnostic register, outside normative premises of liberal interventionism.<sup>105</sup>

To conclude, by framing the institution's contentious operational expansion into the field of security sector reform as a matter of 'manageable risk', Leroy's Legal Memorandum and Staff Guidance Note envisaged a 'paradigm shift' in legal practice where 'boundaries' are traded for 'risk categories' and 'prohibitions' for 'management strategies'.<sup>106</sup> This, she understood, called for both the introduction of novel evaluative tools (such as the 'live instrument' of the ORAF)<sup>107</sup> and the cultivation of an altered professional sensibility oriented towards an adaptive attunement to insecurity and complexity. This calculative, risk-oriented logic, Leroy claimed, 'lays the groundwork' for a radically new 'paradigm for the future role of Bank lawyers in dealing with Articles' interpretation'.<sup>108</sup> This was her response to the perceived need to 'rethink the traditional role played by lawyers in the Bank' and the expressed conviction that 'the legal [department] continues to play a central role'.<sup>109</sup> The institutional 'shift from risk avoidance to risk management, and from bright rules to broad principles', Leroy held, 'need not spell the end of the lawyers' role in ... interpretation or in any other aspect of the Bank's work'.<sup>110</sup>

The assemblage of risk management tools and templates developed elsewhere in the World Bank's operational segments was now put forward as the more opportune and robust mode of legal practice and, thereby, displaced the 'old' language, argumentative practice and professional sensibility of international law(yering) as it had previously been embodied within the organisation. In its practical manifestation, this 'new normative architecture' of risk management signals both the displacement of the oedipal figure by the wellness guru and the concomitant emergence of a type of institutional practice displaying a 'simultaneous commitment to closure and its

<sup>103</sup> Staff Guidance Note (n 66) para 20 (emphasis added).

<sup>104</sup> *Ibid*, para 40.

<sup>105</sup> *Cf* Chandler (n 103).

<sup>106</sup> *Cf* LVP Annual Report 2013 (n 23).

<sup>107</sup> See ORAF (n 70) para 38.

<sup>108</sup> *Ibid*, 96.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid*, 96–97.

impossibility'.<sup>111</sup> Leroy's 'paradigm shift' was oriented at orchestrating action despite uncertainty regarding foundational questions on the limits of institutional authority and the nature of political interference. These formal concerns, which had been central to the authority associated with the oedipal figure, were displaced by holding devices and management tools aimed at coping with (and capitalising on) this open-endedness and contingency. The move from the oedipal figure to the wellness guru thereby reflects a move towards an adaptive, calculative and utilitarian logic grounded in particular material technologies of seeing, reasoning and acting and attuned to the central tenets of the move to un-governance.<sup>112</sup> Our analysis above has explored this 'embrace of risk' as both a set of novel evaluative tools and heuristics as well as the cultivation of a particular (flexible, adaptive) professional sensibility attuned to uncertainty. This turn was rendered visible not only in formal legal decisions but also in operational toolkits, managerial manifestos, visual heuristics, task team compositions and risk management templates.

### **Un-governing through contingency and self-denial – the rationality of resilience**

The foregoing changes in its 'normative architecture' enabled the World Bank's engagement with the security sector of states and with matters of violence and conflict. In this field, new operational models and toolkits were deployed for coping with violence and rationalising socio-political adaptation, in sharp differentiation from the World Bank's earlier practices of institutional reform. Aligning with the articulated features of un-governance, these new models propose to operate *through* rather than *against* unknowability, agnosticism and contingency with adaptive, mutable, open-ended and data-driven attempts at enhancing the resilience of local communities. These transformations entail altered modes of knowing and seeing,<sup>113</sup> a more radical decentring of sovereign sites of authority as essential vectors of reform; and practices of both detection and intervention aimed at capturing and capitalising the immanent and emergent surplus of life formerly situated outside the architectonics of institutional reform. Throughout the World Bank, however, these models were less the result of conscious design and more the result of improvisational, experimental techniques and toolkits – dispersing authority across the staff, rather than consolidating it around a central figure or plan.

The World Bank's 2011 World Development Report (WDR) on *Conflict, Security and Development* is exemplary here. While previous versions of the

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<sup>111</sup> Desai and Lang (n 1).

<sup>112</sup> *Ibid*

<sup>113</sup> Cf Johns (n 15).

institution's flagship publication consistently provide models for an ideal institutional configuration for development (leaving space, of course, for modification of institutional transplants to specific local contexts),<sup>114</sup> the 2011 WDR is surprisingly agnostic when it comes to matters of policy guidance. It underlines on multiple occasions that 'there is no "one path"' to prosperity and security in the development process.<sup>115</sup> 'Institutions do not need to converge on Western models', the report stipulates, 'local adaptation is best'.<sup>116</sup> Rather than putting forward ideal types or best practices, the mantra of the adopted paradigm is that violence is 'complex, diverse and diffuse' and needs to be counteracted by *continuous* adaptation and *homeopathic* forms of policy intervention on the level of 'local institutions'.<sup>117</sup> Violence and poverty are qualified as immanent 'risks' for every society that need to be coped with by 'resilient' institutions.<sup>118</sup> The model, thereby, trades familiar 'cause-and-effect' interventions, grounded in moral or epistemic universals, for iterative, process-based, open-ended and never-ending cycles of policy intervention that work with (rather than against) complexity in an attempt to improve a society's own capacity to manage risk and stress resiliently.<sup>119</sup>

This resilience-based logic clearly differs from recognisable rationalist attempts to bridge knowledge gaps between global projects and local sites

<sup>114</sup> The 2002 WDR, for example, claims that 'existing and newly transplanted institutions can be more effective in poor countries if they are systematically modified to take these differences into account'. Yet, while leaving spaces for this attunement to the 'local' level, the report explicitly proclaims that it 'presents a framework for institutional change' and 'illustrates how to proceed in building more effective institutions'. This WDR thereby serves as a prototype example of modernist 'institution building', where 'local' knowledge is to be factored in the construction of 'effective market-supporting institutions'. The possibility of such epistemic closure – the overcoming of knowledge gaps – is essential to this rationalist model of institutional change. See World Bank, *Building Institutions for Markets* (World Bank 2002) 4, 9, 11.

<sup>115</sup> World Bank, *Conflict, Security and Development* (World Bank 2011) (referred to below as 'World Bank WDR 2011').

<sup>116</sup> *Ibid*

<sup>117</sup> See Michael J Watts, 'Economies of Violence: Reflections on the World Development Report 2011' (2012) *Humanity* 118–119. The WDR, Watts observes, thereby departs from universalist, mechanistic and reductions policy interventions that aimed to transplant context-free and timeless institutional templates (such as the rule of law, democracy or markets).

<sup>118</sup> World Bank WDR 2011 (n 116) 45. (Setting out the general framework for '[b]uilding resilience to violence'). 'In this framing', Chandler more generally observes, 'poverty and related problems become normalized, leading to coping strategies rather than crisis-driven discourses of policy intervention'. See Chandler (n 103) 5.

<sup>119</sup> World Bank WDR 2011 (n 116) 107 ('Just as violence repeats, efforts to build confidence and transform institutions typically follow a repeated spiral'). *Ibid*, 112 ('[L]eaders, stakeholders, and the international community must remember that societies will go through multiple cycles of confidence-building and institutional reform before they can achieve the resilience to violence necessary for development as usual'. The Foucauldian dimension of these iterative interventionist dynamics are apparent. These empirical observations can further be brought in dialogue with wider epistemological transformations. See, for example, Latour (n 11); John Law, *After Method: Mess in Social Science* (Routledge 2004). In the World Bank, a heuristic that has emerged to capture this governance type is 'Problem Driven Iterative Adaptation' (PDIA). See Matt Andrews, Lant Pritchett and Michael Woolcock, 'Escaping Capability Traps Through Problem Driven Iterative Adaptation (PDIA)' (2013) 51(11) *World Development* 234.



of reform: in the turn to immanence, the vector of social change is now inversed. The surplus of life – the externalities and complexities that defy legibility in rationalist registers of reform – are no longer impediments to be overcome but immanent energies to be enrolled and capitalised on.<sup>120</sup> This transformation is apparent in the visual representation of the resilience framework in the WDR, as referred to above and reproduced at Figure 2. The shift from intervention at the level of causation to intervention at the level of resilience is represented here with remarkable optical and metaphorical precision. Expressive of the immanent ontology of the resilience paradigm, the WDR elaborates that the ‘framework is graphically represented as a spiral, because these processes repeat over time as countries go through successive transition moments’.<sup>121</sup> ‘Even as one set of immediate priorities is resolved’, the report observes, ‘other risks and transition moments emerge and require a repeated cycle of action to bolster institutional resilience to stress’.<sup>122</sup> At the heart of this model is the assertion that ‘[b]uilding resilience to violence and fragility is a nationally owned process’, and that ‘external support and incentives’ can only ‘contribute to progress’ insofar as they engage with, enrol and stimulate ‘local organic processes’.<sup>123</sup> The enhancement of autonomous capacities of resilience at a local level, in this sense, is operationalised through unscripted processes of learning and adaptation. The focus on endless, circular iteration (as reflected in the spiral) as well as the inversion of the vector of reform (from the local pointing upwards) signal how this form of un-governance reconfigures the orthodox temporal and spatial coordinates of institution-building.<sup>124</sup> The topographies and temporalities of this reformist project are provisional, open-ended and mediated by mundane material practices of trial, translation and learning. The local thereby appears as an always inaccessible yet pivotal normative repository for the global.<sup>125</sup> The endpoint is always only a moment of reorientation (in potentially different directions) *en route* to ever more of the same. The time and space of reform are (re)organised in the relational practices of resilience themselves.

<sup>120</sup> This reflects the productive embrace of the ‘impossibility of closure’ referred to above. On how these new ways of governing and ‘seeing like a state’ impact modes of critique, our analysis aligns with Johns (n 15). As Chandler notes, the turn to resilience thereby reflect a particular ontological position that sees the ‘reality of the world in its plurality, flux and difference’. See Chandler (n 13) 51.

<sup>121</sup> World Bank WDR 2011 (n 116) 46.

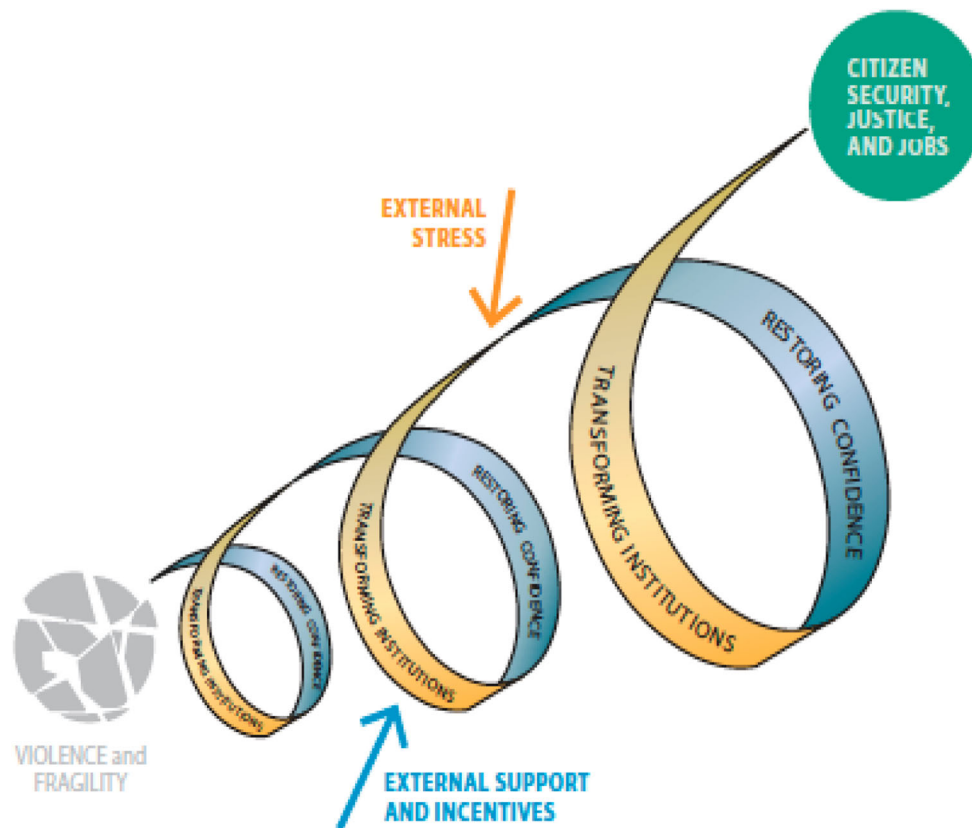
<sup>122</sup> *Ibid* (emphases added)

<sup>123</sup> *Ibid*, 106

<sup>124</sup> Cf Desai and Lang (n 1) 6. (‘It flows from the nature of the visions to be implemented that these [GU] practices do not have a stable topography nor temporality of institutional change’).

<sup>125</sup> Cf Cedric De Coning, ‘From Peacebuilding to Sustaining Peace: Implications of Complexity for Resilience and Sustainability’ (2016) 4(3) *Resilience: International Policies, Practices and Discourses* 166. (‘The agency of the local in the context of a shift in the debate away from liberal top-down problem-solving approaches towards more pluralistic bottom-up approaches that do not have the ambition to resolve conflict, but instead invest in the resilience of local social institutions to prevent, cope with, and recover from conflict’ at 178).





**Figure 2.** The WDR framework: building resilience to violence.<sup>1168</sup> 168 World Bank WDR 2011 (n 116) 45.

## 'The political economy of reform and risk'<sup>126</sup>

The governance strategy associated with WDR 2011 states that the World Bank no longer promotes 'presumed solutions based on institutional and organizational forms [enacted] elsewhere'.<sup>127</sup> Rather, informed by the '*political economy of reform and risk*', the strategy claims to provide a new 'problem-solving approach' that relies on continuous, open-ended cycles of diagnosis and tailored intervention, without 'assumptions about the ideal form a judicial system should take'.<sup>128</sup> In this strategy, 'the use and strengthening of developing countries' systems is central'.<sup>129</sup> The legal department's companion piece is even more explicit in its agnosticism and its rejection of universalist policy models: 'it should be clear that the Bank does not have a blueprint for success in justice reform', the piece states, which calls for a 'problem-solving and empirically based approach ... rather than the establishment of what are identified in advance as the "right" institutions and rules'.<sup>130</sup> New policy 'models and approaches' are called for in this open-ended process of problem-solving, such as the identification of 'flagship justice reform initiatives as sites of learning and innovation'.<sup>131</sup> Rather than seeking to *overcome* the knowledge gaps associated with social complexity by developing updated policy templates, these tools *embrace* the radical contingency of society and seek to govern *through* and *with* contingency via open-ended and adaptable practices of 'problem-solving' that aim at fostering risk resilience at the level of the population. The '*political economy of reform and risk*', in short, does not provide 'pre-set goals' but entails 'the careful management or modulation of interactions to attempt to balance and ease the strains of adaptation as an ongoing process'.<sup>132</sup> It thereby forms a pivotal element in the turn to 'un-governance' within the World Bank.

This shift from the old cause-and-effect ideals of liberal interventionism to practices of (not) knowing and acting associated with resilience was closely linked with new technological assemblages at and including the World Bank.<sup>133</sup> The implementation, adaptation and appraisal of projects designed to amplify resilience at the (always contingent and unknown) 'local' level,

<sup>126</sup> World Bank, *Strengthening Governance, Tackling Corruption: The World Bank Group's Updated Strategy and Implementation Plan* (World Bank 2012) (referred to below as 'World Bank 2012') 32.

<sup>127</sup> *Ibid*

<sup>128</sup> *Ibid*, 35–36 (emphasis added)

<sup>129</sup> *Ibid*, 36

<sup>130</sup> World Bank Legal Vice Presidency, *New Directions in Justice Reform – A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption* (World Bank 2012) (referred to below as 'World Bank Legal Vice Presidency 2012') 7–8.

<sup>131</sup> *Ibid*, 7, 11

<sup>132</sup> This aligns with the observations of Chandler on the turn to resilience – described as an adaptive mode of 'mapping' – more generally. See Chandler (n 13) 51.

<sup>133</sup> On the toolkits associated with 'ignorance work', see Deval Desai and Michael Woolcock, 'Experimental Justice Reform: Lessons from the World Bank and Beyond' (2015) 11 *Annual Review of Law and Social Science* 155; Deval Desai, 'Ignorance/Power: Rule of Law Reform and the Administrative Law of Global Governance' in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar Publishing 2018).

relies on the continuous influx of digital data and diagnostics. Capacity-building and resilience interventions, the governance strategy noted, required new 'diagnostic tools' to 'improve the assessment of country systems' as elements of a 'national capacity building strategy'.<sup>134</sup> The legal vice presidency's companion piece equally urges that '[s]trong diagnostics should inform the design of interventions by providing data on the actual functions of the justice system, the political economy of reform and its risks, and the way potential reforms might translate into progress towards justice'.<sup>135</sup> Both operational documents, therefore, articulate calls to expand the World Bank's data-gathering infrastructure and diagnostic capacities.<sup>136</sup> Importantly, this new infrastructure for data analytics was not only needed within the World Bank but also within these 'local' sites themselves. Consequently, the reform 'process', the companion piece states, supports the 'national capacity for data collection' considered necessary for 'cross-country learning and collaboration'.<sup>137</sup> If 'local' actors or spaces of governance are to be made resilient through iterative and open-ended process of reform, they would need to be seen, measured and mapped. This enormous flow of data is not (or at least not exclusively) processed through pre-existing schemes of interpretation and policy action, however, but also produces new forms of policy design, learning and implementation.<sup>138</sup> The very point of these interventions often emerges only in dialogue with data analytics (a point no longer expressed in terms of 'right institutions' but emanating from the 'needs of end users').<sup>139</sup> Continuous contextual data, in other words, is what materially ties the governmental assemblage of action-despite-agnosticism in the sphere of justice reform together.<sup>140</sup> It is the energy of an unscripted, immanent mode of intervention.<sup>141</sup>

<sup>134</sup> World Bank 2012 (n 128) 37.

<sup>135</sup> World Bank Legal Vice Presidency 2012 (n 132) 8.

<sup>136</sup> World Bank 2012 (n 128) 18. ('[Justice sector reform] requires rigorous and in-depth diagnostics'); 71 ('micro-level quantitative and qualitative diagnostic work is sure to reveal a variety of specific governance ... problems'). World Bank Legal Vice Presidency 2012 (n 132) 8 ('[d]ata is the foundation of ... justice reform'); 10 (emphasising the growing 'need for rapid diagnostic tools that allow potential reformers to embrace opportunities for reform'). This embrace of data analytics as a way of 'living with emergent uncertainty', Amoores notes, resonates with private sector tools of risk management where the emphasis lies on 'information sharing [and] data integration'. Amoores refers in this case to the corporate consultancy of McKinsey. See Amoores (n 10) 12.

<sup>137</sup> World Bank Legal Vice Presidency 2012 (n 132) 10.

<sup>138</sup> *Ibid.*, 8. On this difference, contrast James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998) with Johns (n 15) 849–850 ('[T]he state no longer aspires to make its own maps, or direct its own monocular gaze from on high').

<sup>139</sup> World Bank Legal Vice Presidency 2012 (n 132) 8. This digital registration and enrolment of the 'needs of end users' in unscripted governance interventions resonates with the practice of Pulse Lab Jakarta mapped in Johns (n 15).

<sup>140</sup> With 'data', of course, we do not mean the raw, measured material, but the infrastructure of gathering data, and making it actionable through institutionally stable expert practices. This mode of 'un-governance', in the words of Johns, 'envision[s] possibilities being worked up iteratively and inductively from the inferences that may be drawn from the data available, as limited as those data may be'. See Johns (n 15) 853. See also Lang (n 22).

<sup>141</sup> *Cf* Duffield (n 16) 15 ('Connectivity has allowed resilience to come of age as an operational tool, the roll-out of an embedded digital infrastructure transforms the desired qualities of resilience into a cybernetic command and control function'). See also Chandler (n 13).

One World Bank project – the Honduras *Safer Municipalities Project* – reveals the contours of this risk-resilience assemblage and the way in which its various technical, material and conceptual components are brought together in a particularly powerful way. In line with the expression of un-governance mapped out above, the project's stated objective is to enhance the 'resilience of communities to address key risk factors of violence'.<sup>142</sup> The attempt to enhance capacities of resilience at the local level is embedded in an 'integrated approach to violence prevention', which addresses all 'risk factors that increase the likelihood of a person to become either a victim or perpetrator of violence' through 'multiple, coordinated interventions and activities, whether at the individual, family, peer, community or societal level'.<sup>143</sup> In a remarkable expression of the resilience paradigm, the project states that it will therefore 'use the ecological risk model developed by the WHO to identify and target key risk factors related to violence'.<sup>144</sup> It is the language of immunology and adaptation – not intervention and transplantation – that structures this ideal of governance reform. To orchestrate these localised, iterative and wide-ranging reform projects – generating resilience through 'the family, the school and the community' – the project primarily aims at building a complex data infrastructure: the 'provision of technical assistance and acquisition of equipment to enhance the National Violence Observatory' and the 'strengthening of municipal crime and violence observatories' are central to the spiral-like learning process of resilience, which relies on a continuous flow of 'localised' knowledge and data.<sup>145</sup>

With the turn to resilience, the state as a privileged international legal subject and an insulated sphere of authority is decentred, and the focus shifts to materially observable and legible aspects of life trained for resilience (the 'family, school and community'). The *episteme* of this governmental logic is not the mechanical Enlightenment ideal of causality that underpinned the grand narratives of liberal internationalism. The change is predicated instead on a biophysical vocabulary of autoimmunisation and adaptation emerging from various management, organisational, and social science disciplines – touching on fields like systems theory, cybernetics and ecological sustainability. It no longer commits to policy transplants or scripted techniques for problem-solving, but provides coping strategies for self-empowerment, resilience and risk-management in emergent, complex and contingent processes in which violence and deprivation are engendered. More abstractly, this epistemological rupture can be qualified as a departure

<sup>142</sup> Honduras Safer Municipalities Project (n 99) 45. Note, importantly, how the PAD refers to local 'communities'.

<sup>143</sup> *Ibid.*, 4

<sup>144</sup> *Ibid.*, 13

<sup>145</sup> *Ibid.*, 3, 6–7 (The 'local government's capacity' to handle 'risk' is enhanced through the proliferation of 'high-quality and geo-referenced data').

from orthodox architectonics of sovereign reform towards Foucauldian notions of governmentality. In the latter sense, these transformations can then also be situated in the longer genealogy of attempts to register and enrol the surplus of life, the externalities of modernity, that always escape governance. In this sense, we argue, as expression of un-governance, resilience signals not a suspension but an acceleration of a material mode of governing under conditions of unending competition for its own sake. As with other developments in the genealogy, it represents a moment of material, historical transformation, but simultaneously exhibits elements of continuity with the apparatuses out of which it has developed. Un-governance, as investigated in this special issue, captures the element of pivotal transformation in the move to appropriate the surplus of life as a source of power in the conduct of the population. By the same token, however, the ever-more-granular dispersion of adaptive techniques tailored to the productivity of the population represents continuity, especially insofar as it reflects an extension of economic rationality predicated on myriad individualised material situations. Both these elements, change and continuity, are characteristic of a temporal social order defined by competition without end, driving a race for material change in an unending pursuit of ever-greater production. They are characteristic of a singular regime's escalating attempts to capture an uncapturable surplus of life.

### **Productive practices in a time of endless competition**

Behind the adaptive immediacy associated with the institutional changes described in the preceding sections lie two things that we observe in Foucauldian terms of governmentality: (1) a technology of risk assembled in practice on the basis of an economic appreciation for contingency and emergence, such as in Leroy's 'new normative framework'; and prior even to that, (2) a temporal condition (along the lines of a *dispositif* in the Foucauldian vocabulary) populated by myriad subjects interacting transactionally in a state of competition without end or object beyond sustaining competitive, transactional relationships. The temporal order associated with endless competition is bound up with an historical move away from the universal and teleological orders that preceded the modern political economics of the secular interstate system. Competition and economic self-interest replaced classical empire and imperial ambition.<sup>146</sup> We also, by proposing the metaphors of Oedipus and a wellness guru, incorporated a Lacanian psychoanalytic vocabulary in our analysis, one applicable to the

<sup>146</sup> Foucault (n 12). To be clear: Foucault's argument is that European powers abandoned imperial ambitions to subsume one another; outside of that limited but crucial context, imperial ambition persisted in all of its colonial violence as perpetrated by some of the same European powers.

normative significance of law in this context by virtue of being specifically trained on a central lack around which identity and action are organised and regulated.<sup>147</sup> This vocabulary helps to analyse the work done by and with gaps in knowledge systems inside enterprises of international law and global governance, and the institutional work done despite an impossibility of closure.

In making sense of these practices, we therefore draw on Foucault's work to situate un-governance practices in the temporal and historical frame he established for governmentality, while drawing on the Lacanian vocabulary as the basis for a (non-historicist) assessment of the development of un-governance practices in that frame of governmentality over time. Foucault, in his overall genealogy of rational governance techniques, observes a move from disciplinary and state-oriented governance (identified with *raison d'état*) to a different sort of governmentality keyed to *population*, or the diversity of individuals constituting all together the object and subject of political power in modern, secular social relations.<sup>148</sup> The change over time is bound up with the *dispositif* mentioned above, featuring an embrace of economic rationality for competitive production, production without greater object or end other than the sustenance of more production under competitive circumstances.<sup>149</sup> This condition might be visualised as a spiral, moving in circles without end but always escalating towards a particular direction (ie, heightened competition). Such a figure of the spiral has been used for un-governance purposes by the World Bank, as reproduced above at [Figure 2](#). It is also the figure of a peculiar political economy of self-affirming subjects interacting on a competitive, transactional basis, resulting in ever greater production but without any other apparently unifying teleology.<sup>150</sup>

The emphasis on the productivity of the population prompts a move away from a consolidated centre of disciplinary command associated with the state, towards dispersed technologies predicated not (or no longer primarily) on discipline, but on profiting from the competitive potential of a population in its diversity. That shift over time includes the development of materialised law intended to maximise the productive capacity of the population, by maximising the productive powers of the individuals it comprises in transactional networks. The change marks a move away from imposed rational plans and towards opportunistic responses to dynamic conditions, much as the new direction at the World Bank that we describe diminished reliance on pre-set models in favour of adaptive agency. In the historical context described by Foucault, disciplinary domination could not over time

<sup>147</sup> As elaborated above, our references to Lacan come by way of Žižek (n 7).

<sup>148</sup> Foucault (n 12).

<sup>149</sup> *Ibid*

<sup>150</sup> Geoff Gordon, 'The Time of Contingency in International Law', in Kevin Jon Heller and Ingo Venzke (eds), *Situating Contingency in International Law* (Oxford University Press, forthcoming).

adequately account for the contingent possibilities of dynamic conditions that are inherent in the population. Under conditions of constantly escalating competition, the closure sought by discipline alone was too restrictive.<sup>151</sup> Governmentality, trained on instrumentalising the diverse competitive potentialities of a population, surpassed disciplinary domination (though did not abandon it) with a more process-based, resilience-oriented mode of governance, less vulnerable to contingencies, one more conducive to thriving under competitive conditions.

As a result, the locus of authority moves from diminished central points of consolidated interest and control to still more dispersed technologies operating according to the contingent situation(s) of the population – a process associated with a decentring of sites of authority and an appropriation of ever-expanding productive dimensions of social life. As a means of practical governance, imposed planning becomes apparently less efficacious than opportunistic responses to dynamics emergent in the population itself. But even the population-based governmental programme that capitalises on contingency reaches its productive limit in the phenomenon identified by Foucault as the surplus of life. The surplus of life, however, is a strange sort of limit. It is not an object, but a condition of escape that always frustrates governing structures of power at their margins.<sup>152</sup> And because it describes a condition of perpetual escape, the surplus of life represents a limit that is constantly receding. This is the sort of limit that is produced by the underlying temporal condition (the *dispositif*) of constantly escalating competition without end. The surplus of life is the failure to reach a final point of ultimate productivity, the impossibility of its closure, which makes the surplus of life also the horizon of possibility for ever more competitive performance.

As described by the editors in their introduction to this special issue, un-governance introduces a new governmental practice into this situation, one which in our framework now appears as logical as it does paradoxical: namely, embracing the impossibility of closure to advance the impossible pursuit of closure. And here the Lacanian insight is key to assessing the contemporary situation of institutions pursuing closure by embracing the impossibility of closure: *the embrace of the impossibility of closure can be analysed according to the very urge towards closure with which it conflicts.*<sup>153</sup>

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<sup>151</sup> Foucault (n 11); Foucault (n 12).

<sup>152</sup> Foucault (n 12).

<sup>153</sup> In terms of the temporal disposition, or *dispositif*: to maintain competition, participants must be committed to 'winning', but winning cannot be possible if competition is to be maintained; in the meantime, the commitment to winning drives the pursuit of ever more surplus production, by which the competitive vitality of the population is assured.



## Risk in the register of enjoyment

Key to the developments described here has been the adoption and refinement of risk as a technology of governance. As we instantiated with reference to institutional innovations at the World Bank, risk constitutes a material mode of governing that diminishes law's prohibitive parameters to capitalise on contingency and the impossibility of closure. Risk today includes particular technologies that go beyond risk technologies of just a few years ago. Whereas risk technologies have traditionally been deployed prophylactically, following insurance models, today they are deployed opportunistically, as speculation, more in keeping with practices associated with the world of finance.<sup>154</sup> In this specific historical context, risk technologies produce an equally specific sort of resilience, more closely linked with thriving than with enduring.<sup>155</sup> This combination of speculation and thriving calls for one last Lacanian term, but which is also a quotidian one, namely enjoyment.<sup>156</sup> The specific phenomena of risk and resilience at work in this story demonstrate the political valence of enjoyment under the historical and material conditions of competition today. The connection between risk and enjoyment is already apparent in the regular identification of risk technologies with gambling.<sup>157</sup> As read through Žižek, 'Lacan's fundamental thesis is that superego in its most fundamental dimension is an *injunction to enjoyment*: the various forms of superego commands are nothing but variations of the same motif: "Enjoy!"' By this reading, gambling becomes obligatory, even as it remains distinct from the legal mandate:

Law is the agency of prohibition which regulates the distribution of enjoyment on the basis of a common, shared renunciation ... whereas superego marks a point at which *permitted* enjoyment, freedom-to-enjoy, is reversed into *obligation* to enjoy – which, one must add, is the most effective way to block access to enjoyment.<sup>158</sup>

Our investigations here explore in institutional register this fault line between law and superego, prohibition and prescription, gambling as

<sup>154</sup> The derivative, for example, figures as financial format where risk is employed productively and speculatively – a form of 'risk management in which the relationship between the instrument and an assumed underlying value becomes fleeting, uncertain and loose'. The 'reward characteristics of the derivative', in other words, 'are sustained in a way that is indifferent to the risks of individual underlying elements'. See Amoores (n 10); see also Dick Bryan and Michael Rafferty, *Capitalism with Derivatives* (Palgrave Macmillan, 2006); Duncan Wigan, 'Financialization and Derivatives: Constructing an Artifice of Indifference' (2009) 13(2) *Competition and Change* 157.

<sup>155</sup> We have described this in the Foucauldian register of desire. See (n 11) and (n 76). For an explicit account of such an embrace of risk, see Tom Baker and Jonathan Simon, 'Embracing Risk' in Tom Baker and Jonathan Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, 2002).

<sup>156</sup> The proper Lacanian term is *jouissance*. We use the English translation also to signal our simplified usage, tailored to the institutional context of our investigations. See, Jacques Lacan, 'The Ethics of Psychoanalysis': 1959–1960: *The seminar of Jacques Lacan: Book VII* (WW Norton and Company, 1992).

<sup>157</sup> Cf Lisa Adkins, *The Time of Money* (Stanford University Press, 2018).

<sup>158</sup> Žižek (n 7) 237.



object of regulation and gambling as a mode or mandate of regulation.<sup>159</sup> Žižek encapsulates the difference as follows: '[t]he external law regulates pleasures in order to deliver us from the superegotistical imposition of enjoyment which threatens to overflow our daily life.'<sup>160</sup> In our study, the super-ego has been switched out for the World Bank's 'new normative architecture', with the daily overflow being a driver behind risk-based governance routines that would capitalise on immanent conditions of a surplus of life.

But gambling has been the frustrating pursuit of enjoyment throughout a variety of historical and material conditions. The question becomes: why does gambling take the form of a governmental technology now? With this question, we echo what is asked in the introduction to this special issue: why now? Consider in this light the economic analysis of Mariana Mazzucato. She details how the historical field of political economy was surpassed by the narrower discipline of economy, which turned in the process from objective measures of value (such as a labour theory of value as measured by the amount of labour necessary to produce a commodity) to subjective ones (especially the theory of marginal utility as measured by price, or what so many individual customers are willing to pay for something).<sup>161</sup> This subjective shift in economic reason dovetails with the elevation of the individual, or the abstracted individual engaged at the scale of the transacting population. And as Mazzucato makes clear, it establishes the possibility of comprehending material value creation in purely speculative exercises that produce no new goods.<sup>162</sup> The washing machine has a value measured in price, as does the packaging and repackaging of debt accrued in the purchase of the washing machine, or a bet on the likelihood that the repackaged debt will be worth more or less over time. Under mainstream, marginal utility (or equilibrium) economic theory, the achievement of value objectively becomes indistinguishable from possibilities of gain by speculative wager. The enjoyment of gambling thereby becomes socially useful, elevating its performance in the register of risk to a level appropriate to governance. But more than useful, *it becomes socially necessary*, as constant conditions of always-intensifying competition ensure that every next opportunity must be capitalised on. Indeed, as Leroy argued, the new risk calculus needs to include the 'risk of not acting' – the risk of missing out.

<sup>159</sup> Cf Joan Copjec, *Read my desire: Lacan against the historicists* (MIT Press 1994). For cognate investigations in other contexts into a materialized turn away from formal imperatives associated with the oedipal complex.

<sup>160</sup> Žižek (n 7) 241.

<sup>161</sup> Mariana Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (Penguin, 2018).

<sup>162</sup> *Ibid*

In other words, survival is no longer an issue of guarding against contingency, but the competitive requirement to exploit it. And so, risk not only secures against the contingent, *à la* insurance in its classical form, risk also capitalises on the contingent, for instance in the forms of finance associated with speculation. The financial derivative, pervasive in the contemporary transnational economy even since the global crash occasioned by the instrument, is supposed to do both of these things at once, delivering surplus profit while distributing the costs of failure. The same spirit of resilience-with-profit was apparent above in the promise of ‘transformational rewards’ attendant on the embrace of risk-management in the legal practices of the World Bank. More than anything else, as Dillon has observed elsewhere, risk technologies ‘provide opportunity for gain or they compensate people [and things] for any loss they may incur, *allowing them to continue to actively circulate in the general combinatorial and transactional economy of contingency*’ in the first place.<sup>163</sup> Yet, to say that risk technologies *allow* activity is misleading: the interlacing of legal regimes, financial instruments and insurance practices, among other things, work together to *enable* and *ensure* activity, whether to minimise negative exposure or to maintain profit and growth in an endlessly competitive environment, one metastasised today by predictive technologies capable of extracting and deploying massive amounts of data to extend the scale and scope of speculative, risk-oriented performance for governance (and other) purposes. In short, risk is constitutive of institutional participation today in the endless competition that materially defines contemporary subjects in their interrelations.

## Conclusion: un-governance and critique

We indicated earlier that we intend to contribute to a new mode of critique suited to some of the distinct features that we associate with un-governance.<sup>164</sup> Specifically, we are interested in a mode of critique attuned to the productive performativity of this new mode of governance.<sup>165</sup> We are not especially interested in the failure of un-governance practices to ‘live up’ to any representational figure or promise. In part, this is because we are not much convinced that un-governance actors are much interested any more in representing any idealistic promise. Idealism figures into our two empirical threads at the World Bank only in connection with Shihata, the embodiment of our oedipal figure, who described a line between law and politics that the World Bank’s legal counsel was bound by mandate not to cross. That representation operated as a sort of constitutional (and

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<sup>163</sup> See Dillon (n 102) 327 (emphasis added).

<sup>164</sup> See Žižek (n 19).

<sup>165</sup> See Johns (n 15); Lang (n 22); Amore (n 10).

constitutive) limit, an ideal-type boundary mark projected back into the identity of the legal counsel to define (and delimit) its practice.<sup>166</sup> It also provided an object for critique. Leroy's legal counsel, however, does not maintain that ideal boundary mark, nor the professional identity that it supports. Under Leroy, the World Bank's legal counsel is an opportunistic one, trained on and for resilience and productivity, unbound from Shihata's defining prohibition. To be clear: by opportunistic, we do not mean (to be) cynical. And that is the point. Leroy's legal counsel is the wellness guru, aiming at vitality rather than disciplinary identity. In this mode, it is adaptive, resilient and productive, full stop. And it is resilient-productive (productive of and for resilience) as part of a remarkable new development in a condition of governance that calls for competitive productivity without any objects or ends beyond competitive productivity itself. This development is what we associate with un-governance, in which there is diminished adherence to or deployment of a false ideal(ism), diminished reliance on representations to be failed in practice, but also diminished identification of or with any unitary purpose.

The pursuit of closure persists, as it must in a condition of ever more competition, because without the gesture of intended closure – the ambition to win and not lose – the competitive pursuit collapses. But now it includes an embrace of the impossibility of closure, the receding horizon that sustains the perpetual competition in the first place. As a result, there remains only the productivity, in a pressurised system that drives ever greater productivity, and it is on this performance that we mean to train our critique. With our contribution to this special issue, we have proposed a particular framework by which to make specific institutional aspects of un-governance legible in historical context. We have instantiated that framework and those institutional aspects with two developments at the World Bank. Comprehending the productive reality of these practices has been our primary goal here, to enable further critical investigation into their possibilities and discontents going forward.

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<sup>166</sup> Žižek (n 7) 109–112.